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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. GERMAN GONZALEZ, Defendant and Appellant.	B215802 (Los Angeles County Super. Ct. No. VA103902)

APPEAL from a judgment of the Superior Court of Los Angeles County, William J. Birney, Jr., Judge. Remanded for resentencing.

Julie Schumer, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, James William Bilderback II, and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted German Gonzalez of two counts of robbery and two counts of aggravated assault and found true specially pleaded allegations that Gonzalez had personally inflicted great bodily injury within the meaning of Penal Code section 12022.7, subdivision (a).[1] On appeal Gonzalez contends the trial court erred in denying his motion to suppress eyewitness identifications on the ground they were tainted by an unduly suggestive in-person lineup. He also contends the prosecutor and the court made improper comments during trial that prejudiced his defense and the court erred in replacing a juror after the case had been submitted to the jury. We reverse the judgment to enable the trial court to correct an error in sentencing and, in all other respects, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Information*

An amended information charged Gonzalez with two counts of second degree robbery (§ 211) (counts 1 and 2) and two counts of assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)) (counts 3 and 4). As to counts 2, 3 and 4 the information specially alleged that Gonzalez had personally inflicted great bodily injury on his victims (§ 12022.7, subd. (a)). It also alleged as to all counts that he had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a), and a prior serious or violent felony conviction within the meaning of the "Three Strikes" law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). Gonzalez pleaded not guilty and denied the special allegations.

2. *The Crimes*

Shortly after midnight on March 28, 2007 Gonzalez and two other men entered a bar in Downey. Sharon Christmas was the bartender on duty. Her friend, Barbara Rodriguez, who occasionally helped out at the bar, was also present. By 1:30 a.m. all the patrons except Rodriguez, Gonzalez and his two companions had left. Gonzalez offered Christmas money to allow him to have a private after-hours party. Christmas refused and asked Rodriguez to help get Gonzalez and his companions to leave so she could close the

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1 Statutory references are to the Penal Code unless otherwise indicated.

bar. Rodriguez, who had been playing pool with Gonzalez, took Gonzalez and his friends outside to have a cigarette. Rodriguez returned alone about five minutes later when the bar's owner, Jim McPherson, arrived.

After McPherson came in and locked the door, Christmas began to empty the cash register. Just then, McPherson, Christmas and Rodriguez were interrupted by a loud pounding on the door. Fearful it might be Gonzalez and his companions, Christmas and Rodriguez pleaded with McPherson not to open the door. McPherson disregarded the warning, opened the door and was immediately attacked and knocked unconscious by David Delgado, one of Gonzalez's companions. Gonzalez charged Rodriguez and hit her hard in the face, knocking her to the floor; he then grabbed Christmas's hair and slammed her face into the cash register 10 to 15 times. Gonzalez demanded Christmas give him money from the cash register and from a separate bank bag. After she complied, he walked toward the exit, pulling her by the back of her hair. He then threw her against a wall, breaking her collarbone. When Christmas fell to the ground, Gonzalez stomped on her face, leaving a visible shoe print. Christmas, who suffered severe injuries in the attack, may have briefly lost consciousness. The men fled, and Rodriguez called the police emergency number.

3. *The Witnesses' Identifications*

On March 29, 2007, one day after the robbery and assault, Christmas identified Gonzalez from a photographic lineup (commonly called a "six pack"), indicating "I think [he's] the one, but I am not sure." On March 30, 2007 Rodriguez also identified Gonzalez from a photographic lineup, stating "Looks like the one who hit me."[2]

In December 2007 Christmas and Rodriguez unequivocally identified Gonzalez as their attacker in a live lineup. Gonzalez's counsel was present during the lineup and made no objections. Both women also identified Gonzalez at the preliminary hearing and at trial. During their testimony, Christmas and Rodriguez each explained they recalled the man who had assaulted them had an eye flutter and, during the live lineup, both had

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2 McPherson had only glimpsed his attacker's face and was unable to positively identify anyone.

seen Gonzalez put his hand to his eye. Both women denied their recognition of Gonzalez was based on his eye twitch.

Dr. Robert Shomer, a psychologist specializing in eyewitness identification, testified at trial as an expert witness for the defense. Dr. Shomer stated eyewitness identifications are inherently unreliable. Shomer described the photographic lineup shown to both women as suggestive and explained it would have been more reliable had the photographs been displayed one at a time rather than shown together as a group. The live lineup itself was not meaningful, he testified, because such lineups simply tend to reinforce the person's memory of the photograph they had previously selected, rather than serve as an accurate tool to identify the person who committed the crime. The fact one person is a constant selection in all identification procedures, Shomer opined, is not an independent test of the reliability of the witness's identification, particularly when it follows an initial, highly suggestive identification process.

Gonzalez did not testify. His mother and his sister testified he was sick and had been at home with them at the time the crimes occurred. Chaim Magnum, Gonzalez's former attorney who had been present during the lineup, testified he did not see Gonzalez make any gesture toward his eye during the lineup nor did he notice an eye flutter. Magnum also testified he did not notice anything that distinguished Gonzalez from the rest of the group during the identification procedure.

4. *Gonzalez's Conviction and Sentence*

The jury convicted Gonzalez on all counts and found true the specially alleged great bodily injury enhancements. In a bifurcated proceeding on the prior conviction allegations, Gonzalez admitted he had suffered a prior serious conviction within the meaning of section 667, subdivision (a)(1), and a prior serious or violent felony conviction within the meaning of the Three Strikes law. Gonzalez was sentenced to an aggregate state prison term of 23 years.

DISCUSSION

1. *The Trial Court Properly Denied Gonzalez's Motion To Suppress*

a. *Relevant facts and proceedings*

Prior to trial Gonzalez moved to suppress all evidence of the December 2007 lineup and any in-court identifications of him by Christmas and Rodriguez on the ground the lineup was impermissibly suggestive—it appeared, although defense counsel was not certain, that Gonzalez had an eye twitch and that he was the only person in the lineup to have that distinctive feature—and the improper lineup tainted the subsequent in-court identifications. At the very least, Gonzalez's counsel argued, Gonzalez was entitled to an evidentiary hearing to investigate the propriety of the live lineup.[3]

The court rejected Gonzalez's request for an evidentiary hearing, concluding it was unnecessary because there was no conflict in the evidence proffered by Gonzalez and the People regarding the circumstances of the lineup. The court then denied the motion to suppress, finding it was not unduly suggestive and, accordingly, there was no basis to exclude from evidence the eyewitness identifications made at the lineup or the subsequent identifications of Gonzalez made at the preliminary hearing or that might be made at trial. The court, however, informed Gonzalez he would have the opportunity at trial to present evidence challenging the reliability of the identifications.

b. *Governing law and standard of review*

Due process requires the exclusion of identification testimony only if (1) the identification procedures used were unnecessarily suggestive and (2) the resulting identification was unreliable. (*People v. Yeoman* (2003) 31 Cal.4th 93, 123; *People v. Cunningham* (2001) 25 Cal.4th 926, 989; *Manson v. Brathwaite* (1977) 432 U.S. 98, 106-114 [97 S.Ct. 2243, 53 L.Ed.2d 140].) As for the procedures used, "there is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance." (*People v. Cook* (2007) 40 Cal.4th 1334, 1355.)

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3 Although Dr. Shomer testified the photographic lineup was unduly suggestive and improperly influenced the live lineup, Gonzalez does not challenge the photographic lineup on appeal.

"Because human beings do not look exactly alike, differences are inevitable. The question is whether anything caused defendant to 'stand out' from the others in a way that would suggest the witness should select him." (*People v. Carpenter* (1997) 15 Cal.4th 312, 367*;* see *People v. Ochoa* (1998) 19 Cal.4th 353, 413 ["for a witness identification procedure to violate the due process clauses, the state must, at the threshold, improperly suggest something to the witness—i.e., it must, wittingly or unwittingly, initiate an unduly suggestive procedure"].)

Even if the procedures are found to be unduly suggestive, a witness's identification testimony is only inadmissible if the """"totality of the circumstances"" suggests '"a very substantial likelihood of irreparable misidentification."'" (*People v. Arias* (1996) 13 Cal.4th 92, 168; see also *People v. Cunningham, supra,* 25 Cal.4th at p. 989.) In determining reliability under the totality of the circumstances, the court should consider such factors as "'the opportunity of the witness to view the criminal at the time of the crime, the witness'[s] degree of attention, the accuracy of the witness'[s] prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and the confrontation.'" (*People v. Kennedy* (2005) 36 Cal.4th 595, 610, quoting *Neil v. Biggers* (1972) 409 U.S. 188 [93 S.Ct. 375, 34 L.Ed.2d 401].)

The question whether an identification procedure was so suggestive that it violated due process is a mixed question of law and fact subject to de novo review. (*People v. Kennedy, supra,* 36 Cal.4th at p. 609 ["we conclude that the standard of independent review applies to a trial court's ruling that a pretrial identification procedure was not unduly suggestive"].)

c. *The live lineup was not unduly suggestive*

Gonzalez contends the live lineup was unduly suggestive because he was the only person with an eye twitch and thus plainly "stood out" from the rest of the men in the lineup. However, even if Gonzalez was the only individual with an eye twitch, he failed to present any evidence the tic was sufficiently conspicuous to set him apart from the other men in the lineup. To the contrary, Christmas and Rodriguez both testified the tic

was not constant, but appeared every "once in a while." Although Christmas and Rodriguez saw Gonzalez raise his hand to his eye when he walked out, both explained they recognized Gonzalez without regard to that movement or the eye twitch. Moreover, Magnum, Gonzalez's former attorney who had been present at the lineup, testified he did not notice Gonzalez had an eye twitch and further testified he did not notice any other distinguishing feature that caused Gonzalez to stand out. Thus, whatever the nature of Gonzalez's eye twitch, it was not such a prominent characteristic that it made the lineup constitutionally suspect. (See, e.g., *People v. Gonzalez* (2006) 38 Cal.4th 932, 943 [defendant's droopy eye did not make photographic lineup unduly suggestive: "[N]one of the witnesses had described the gunman as having a distinctive eye, so any distinctiveness in [defendant's] photograph would not suggest the witness should select that photograph. Moreover, 'it would be virtually impossible to find five others who had a similar eye 'and who also sufficiently resembled defendant in other respects.'"]; *People v. Carpenter*, *supra*, 15 Cal.4th at p. 367 [minor differences in facial hair among participants did not make line up unduly suggestive].)

Because the procedure used to conduct the live lineup was not itself inherently suggestive, Gonzalez's assertion the in-court identifications were tainted by the live lineup also necessarily fails. (See, e.g., *People v. Cook*, *supra*, 40 Cal.4th at p. 1355 [because "defendant has failed to show that the various identification procedures were unduly suggestive" court need not consider whether the in-court identifications were tainted by improper lineup]; accord, *People v. Cunningham*, *supra*, 25 Cal.4th at p. 989.)

d. *The court did not commit prejudicial error in denying Gonzalez's motion to suppress without holding an evidentiary hearing*

Gonzalez contends he was prejudiced by the court's failure to conduct an evidentiary hearing in connection with his motion to suppress, arguing it was necessary to explore the role the eye tic played in the witnesses' identification. As defense counsel explained to the trial court, "I have a suspicion that there may have been an unduly suggestive lineup based on the fact that the witnesses recognize[d] a particular physical tic that was not present on the other five. What I don't know is whether that was done

deliberately or as a matter of happenstance. And I would like to take evidence so that the court could rule based on the evidence that, yes, you know what, the police did know about this and they did set up the lineup that was unduly suggestive, or no this was not known, it was not considered, and therefore the lineup was not unduly suggestive. But I don't think we have enough evidence right now."[4]

At the threshold, Gonzalez has not, either in the trial court or on appeal, identified any factual conflict concerning the manner in which the lineup was conducted that needed to be resolved by an evidentiary hearing. (See *People v. Floyd* (1970) 1 Cal.3d 694, 712 [There is no language in any case "that suggests a demand for a voir dire hearing in the issue is required or appropriate regardless of the circumstances of the lineup. A hearing outside the jury's presence is required only where there is some factual conflict concerning the fairness of the lineup."], disapproved on another ground in *People v. Wheeler* (1978) 22 Cal.3d 258, 287, fn. 36.) To the extent Gonzalez sought a hearing to determine whether the police knew about the tic, that question is simply irrelevant to the due process issue presented. (See *People v. Ochoa*, *supra*, 19 Cal.4th at p. 413 [due process evaluation concerns whether state "wittingly or unwittingly" initiated an unduly suggestive procedure].)

Not only was there no conflict in the evidence concerning the lineup that required resolution in a pretrial hearing, but also the evidence actually presented at trial belies Gonzalez's challenge to the reliability of Christmas's and Rodriguez's repeated and consistent identifications of him as one of the perpetrators. Although Gonzalez emphasizes Dr. Shomer's expert testimony on false memory, Shomer opined on the reliability of lineups generally, not on the role the purported eye twitch may have played in the specific identifications at issue in the case. To the contrary, Dr. Shomer minimized the significance of the live lineup, focusing his testimony instead on the suggestiveness of

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[4] As discussed, the court determined that there was no need to take evidence to rule on the motion to suppress: "If from the very thorough briefs from both sides, I felt that there were need to take evidence, I would. I just do not in view of the sufficiency of your briefs."

the procedures used in connection with the victims' identification of Gonzalez from the photographs shown to them—an issue not pursued by Gonzalez on appeal.

2. *The Prosecutor Did Not Commit Prejudicial Misconduct*

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution only when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'" (*People v. Navarette* (2003) 30 Cal.4th 458, 506; accord, *People v. Morales* (2001) 25 Cal.4th 34, 44.)

a. *The prosecutor's comments on the absence of fingerprint evidence*

During closing argument the prosecutor remarked, "There is no fingerprint evidence obtained in this case. If there had been prints recovered the defense would then be, well, yes, the defendant was in the bar. He was drinking or—." Defense counsel objected at this point; the objection was overruled. The prosecutor continued, "If prints would have been found there would have been an explanation as to why." Once again, defense counsel objected.[5] The trial court overruled the objection and denied Gonzalez's motion for a mistrial.

Gonzalez contends the prosecutor's comment unfairly impugned defense counsel's integrity not only by arguing Gonzalez's alibi defense was false, but also by suggesting, if there had been fingerprint evidence showing Gonzalez had in fact been at the bar the

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5 Outside the presence of the jury defense counsel told the court, "Your Honor, once again I assert prosecutorial misconduct against Ms. Mader [the prosecutor] for that comment that if fingerprints had been found the defense would have some excuse for it. That is essentially telling the jury I am a liar, and they can't trust anything that I say." The trial court overruled the objection and denied the motion for a mistrial, explaining it was not improper for the prosecutor to surmise what the defense might be and then respond to it.

night of the robbery, defense counsel would simply have fabricated another explanation consistent with his innocence. (See *People v. Bemore* (2000) 22 Cal.4th 809, 846 [it is generally improper for prosecutor to accuse defense counsel of fabricating a defense or imply counsel is free to deceive jury]; *People v. Young* (2005) 34 Cal.4th 1149, 1189 "[p]rosecutorial argument that denigrates defense counsel directs the jury's attention away from the evidence and is therefore improper"].) We review a trial court's ruling regarding prosecutorial misconduct for abuse of discretion. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213.)

The prosecutor has broad discretion to state its views as to what the evidence shows and what inferences may be drawn from it. (*People v. Mitcham* (1992) 1 Cal.4th 1027, 1052; accord, *People v. Cunningham, supra,* 25 Cal.4th at p. 1026.) Here, the prosecutor's remarks concerning the immateriality of the lack of fingerprint evidence was a fair comment on the state of the evidence and a response to the defense's emphasis on the lack of such evidence.[6] (See *People v. Bemore, supra,* 22 Cal.4th at pp. 846-847 [prosecutor may fairly anticipate flaws likely to appear in counsel's closing argument based on evidence that was introduced]; *People v. Cummings* (1993) 4 Cal.4th 1233, 1302, fn. 47 ["[a]n argument which does no more than point out that the defense is attempting to confuse the issues and urges the jury to focus on what the prosecution believes is the relevant evidence is not improper"]; *People v. Marquez* (1992) 1 Cal.4th 553, 575-576 [prosecutor's reference to defense as "smokescreen" not misconduct]; *People v. Young* (2005) 34 Cal.4th 1149, 1193 [prosecutor's characterization of defense counsel's argument as "idiocy" was fair comment on counsel's argument].) There is no reasonable likelihood the jury would have understood the remark to impugn counsel's

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6 The People's theory of the case, confirmed by Christmas and Rodriguez, was that Gonzalez had been in the bar drinking on the night of the robbery. Given the victims' identification of Gonzalez as one of the perpetrators, there was no need to test the barroom for his fingerprints precisely because the presence of Gonzalez's prints would not necessarily be probative of his guilt. The apparent point of the prosecutor's comment was not that defense counsel would fabricate an explanation for the fingerprints, but that Gonzalez's alibi defense itself was not true.

integrity. (*People v. Osband* (1996) 13 Cal.4th 622, 696 [prosecutor's question to the jury as to what other explanation could account for the evidence at the defendant's apartment was fair comment on evidence and inferences drawn therefrom; no reasonable likelihood jury understood comment as shifting burden of proof to defendant]; *People v. Mayfield* (1993) 5 Cal.4th 142, 179.)

b. *The prosecutor's objection to defense counsel's argument*

During closing argument defense counsel stated, "I thought it was incredibly timely when I sat down with a cup of coffee with my little kids running around on Saturday morning and I open up my Los Angeles Times and I read: DNA in 1985 rape exonerates man who died behind bars." The prosecutor objected to the remark. The court responded the objection seemed premature, as it believed defense counsel intended to tie the article into this case. The prosecutor then stated, "I also [want] to make a record it is one, unethical and two, that nothing has been shown to the . . . D.A. [District Attorney] and three, that the D.A. actually handed over their slides to the defense attorney prior to actually doing their closing." The court excused the jury to discuss the matter further with counsel. After additional (and similarly opaque) colloquy, the court denied the defense's motion for a mistrial and declined to give a curative instruction, reasoning, "I think the jury is almost in the dark, as I am, because there have just been utterances back and forth and there is no impression made on them at all because there was hardly any impression made on me, you both move so quickly. So I am going to just proceed. If you wish at some future time to take it up, that can be done, but we are going to proceed." Defense counsel resumed his argument and tied in the article by stating, like the subject in the article, "this is a case of mistaken identification."

Gonzalez contends the prosecutor improperly and prejudicially accused his counsel of engaging in unethical behavior. (See *People v. Cash* (2002) 28 Cal.4th 703, 732 [misconduct for prosecutor to impugn integrity of defense counsel].) Although the propriety of the prosecutor's comments following the court's ruling on her objection is questionable, the trial court concluded the colloquy between counsel was so fast-paced and confusing that there was no reasonable probability the jury would understand the

prosecutor's isolated remark to disparage defense counsel. Nothing in Gonzalez's appellate brief or in the record supports a departure from that analysis. (See *People v. Cummings, supra,* 4 Cal.4th at p. 1302 [no misconduct when jury would understand statement to be nothing more than a plea to the jury not to be misled]; *People v. Valdez* (2004) 32 Cal.4th 73, 132-133.) Certainly, the isolated reference was not so "egregious" or "reprehensible" as to rise to the level of prejudicial misconduct. (*People v. Navarette, supra,* 30 Cal.4th at p. 506; *People v. Morales, supra,* 25 Cal.4th at p. 44.)

3. *The Trial Court's Use of CALCRIM No. 315 Does Not Compel Reversal*

When instructing the jury with CALCRIM No. 315, listing factors the jury could consider when evaluating eyewitness identifications, the court interjected two comments: First, when the court read, "Was the witness asked to pick the perpetrator out of a group," the court said, "And you know that happened here." Second, when the court read, "Was the witness able to identify the defendant in a photographic or physical lineup?," the court added, "And again, both in this case."[7] At defense counsel's objection, the court

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7 The trial court read CALCRIM No. 315 to the jury as follows (the contested additional comments are included in parentheses):

"You have heard eyewitness testimony identifying the defendant. As with any other witness, you must decide whether an eyewitness gave truthful and accurate testimony. In evaluating identification testimony, you may consider the following questions: Did the witness know or have contact with the defendant before the event? How well could the witness see the perpetrator? What were the circumstances affecting the witness's ability to observe, such as lighting, weather conditions, obstructions, distance and duration of observation? How closely was the witness paying attention? Was the witness under stress when he or she made the observation? Did the witness give a description and how does that description compare to the defendant? How much time passed between the event and the time when the witness identified the defendant? These are very practical considerations. Was the witness asked to pick the perpetrator out of a group? (And you know that happened here.) Did the witness ever fail to identify the defendant? Did the witness ever change his or her mind about the identification? How certain was the witness when he or she made an identification? Are the witness and the defendant of different races? Was the witness able to identity other participants in the crime? Was the witness able to identify the defendant in a photographic or physical lineup? (And, again, both in this case.) Were there any other circumstances affecting the witness's ability to make an accurate identification? The People have the burden of

agreed to provide a curative instruction, telling the jurors after closing arguments had concluded, "Now I want you to understand once in a while I get involved here in the case and I want you to know it is not my role to tell you what your verdict should be. And you should not take anything I have said or done during the trial as an indication of what I think about the facts or the witnesses or whatever your verdict should be." Defense counsel did not object to that instruction as inadequate.

"'A California trial court may comment on the evidence, including the credibility of witnesses, so long as its remarks are accurate, temperate, and "scrupulously fair." [Citation.] Of course, the court may not express its views on the ultimate issue of guilt or innocence or otherwise "usurp the jury's exclusive function as the arbiter of questions of fact and credibility of witnesses."'" (*People v. Sanders* (1995) 11 Cal.4th 475, 531, quoting *People v. Melton* (1988) 44 Cal.3d 713, 735.) We "'evaluate the propriety of judicial comment on a case-by-case basis, noting whether the peculiar content and circumstances of the court's remarks deprived the accused of his right to trial by jury.' [Citation.] 'The propriety and prejudicial effect of a particular comment are judged both by its content and by the circumstances in which it was made.'" (*Sanders,* at pp. 531-532.)

Gonzalez argues the court's remarks while reading CALCRIM No. 315 usurped the jury's function by making findings on key factors relating to the accuracy and reliability of the eyewitness identifications and further contends the prejudice was not diminished by the court's curative instruction. At the threshold, defense counsel's failure to object to the adequacy of the court's curative instruction forfeits the argument on appeal. (*People v. McDermott* (2002) 28 Cal.4th 946, 1001.) The argument also fails on its merits.

The court's remarks, fairly construed, refer to the uncontested *use* of photographic and live lineups by police rather than fiercely contested *reliability* of those procedures.

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proving beyond a reasonable doubt that it was the defendant who committed the crime. If the People have not met this burden, you must find the defendant not guilty."

(See generally *People v. Melton, supra,* 44 Cal.3d at p. 735 [court's peripheral remark concerning witness's memory did not unfairly rehabilitate witness; court's peripheral remark, in context, was accurate representation of evidence].) In any event, the jury was provided with the correct written version of the instruction without the court's editorial comments (see *People v. Osband, supra,* 13 Cal.4th at pp. 687-688 [trial court's oral departure from instruction harmless when jury is provided with correct version of written instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 137-138) [same]), as well as a proper curative instruction. Under the circumstances the court's comments do not compel reversal.

4. *The Trial Court's Replacement of a Juror With an Alternate Was Not Error*

After the case was submitted but before the jury began deliberating, the court excused Juror No. 3 because of illness and replaced that juror with the alternate juror. The court read CALCRIM No. 3575 to the reconstituted jury, stating, "Do not consider this substitution for any purpose. [¶] The alternate juror must participate fully in the deliberations that lead to any verdict. The People and the defendant[s] have the right to a verdict reached only after full participation of the jurors whose votes determine that verdict. This right will only be assured if you begin your deliberations again, from the beginning. Therefore, you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place. [¶] Now please return to the jury room and start your deliberations from the beginning."

Gonzalez contends the post-submission replacement of Juror No. 3 violated his federal constitutional right to trial by jury and its unanimous jury guarantee. Gonzalez acknowledges the California Supreme Court has held the post-submission replacement of a juror is permissible under the California Constitution when good cause has been shown and the jury has been instructed to begin deliberations anew. (See *People v. Collins* (1976) 17 Cal.3d 687, 691 [§ 1089, authorizing substitution of alternate juror before or after final submission of case to jury on showing of good cause, does not violate jury trial right and its guarantee of a unanimous jury when jurors are instructed to begin

deliberations anew].) Gonzalez nonetheless contends the post-submission substitution of a juror, even if permissible under the California Constitution, violates the federal Constitution. That argument has also been expressly rejected. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1409.) Accordingly, we deny this claim on its merits. (*Ibid*.; *Collins*, at pp. 691-694; see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

5. *Remand Is Necessary for the Trial Court to Correct an Unauthorized Sentence*

In sentencing Gonzalez to 23 years in state prison, the trial court improperly used the conviction on count 1 (the robbery of McPherson) as the principal term, rather than one of the convictions on counts 2, 3 or 4, which each included a great bodily injury enhancement (§ 12202.7, subd. (a)) and which, together with the penalty for the underlying offense, required a greater term than the one imposed for count one. (See § 1170.1, subd. (a) ["principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements"].) In addition, at the prosecutor's behest, the trial court sentenced Gonzalez to consecutive terms on counts 2 and 3 (the robbery and the aggravated assault of Christmas) for the underlying offenses, but improperly imposed the three-year great bodily injury enhancements concurrently because it "involved the same victim." If, as it appears, the trial court impliedly found the robbery and the assault could properly be punished separately without violating section 654 and consecutive sentences were appropriate, the court should have also imposed the enhancement to run consecutively with the penalty for the underlying offense (see *People v. Mustafaa* (1994) 22 Cal.App.4th 1305, 1310-1311 [underlying offense and enhancement must both run consecutively or concurrently to the other terms imposed]) and, as it did with the underlying offense, include only one-third the great bodily injury enhancement as part of the subordinate term. (See § 1170.1, subd. (a).)

Thus, had the court properly used one of the other counts as the principal term (it makes no difference which of counts 2, 3 or 4 is used, as the middle term for each is three years) and sentenced Gonzalez to consecutive terms on all counts, Gonzalez would have

received an aggregate state prison sentence of 22 years, not 23 years.[8] However, we cannot determine whether the trial court would have imposed consecutive or concurrent terms for the robbery and aggravated assault against Christmas (counts 2 and 3) given its decision to impose an improper hybrid sentence. Accordingly, we remand for the limited purpose of resentencing in accordance with the principles expressed in this opinion. (See *People v Bradley* (1998) 64 Cal.App.4th 386, 400-402 [remand for resentencing is appropriate when sentencing choice within trial court's discretion].)

DISPOSITION

The judgment is reversed and the matter remanded for the limited purpose of allowing the trial court to resentence Gonzalez in accordance with the principles expressed in this opinion. In all other respects, the judgment is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.

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8 Properly calculated, Gonzalez's sentence, presuming all counts ran consecutively, would be 22 years: Nine years for count 2, the principal term (the middle term of three years, doubled under the Three Strikes law plus three years for the great bodily injury enhancement); two subordinate terms of three years each (for a total of six years) on counts 3 and 4 (one-third the principal term, doubled under the Three Strikes law, plus one-third of the great bodily injury enhancement); and 2 years for count 1 (one-third the principal term, doubled under the Three Strikes law), plus five years pursuant to section 667, subdivision (a).